IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

Case No. 76-6617

RICHARD AUSTIN GREENE

Petitioner

vs.

RAYMOND D. MASSEY, Superintendent
Union Correctional Institution

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Richard Austin Greene respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 26, 1977, affirming the order of the United States District Court for the Middle District of Florida entered February 24, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as Greene v. Massey, 546 F.2d 51 (5th Cir. 1977). The opinion is contained in the appendix commencing on page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered January 26, 1977. This Court has jurisdiction to review the judgment by writ of certiorari as authorized by 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in finding that the double jeopardy clause of the Fifth Amendment of the United States Constitution did not bar retrial of Petitioner for the same offense after an appellate court found that the trial court erred in not directing acquittal for insufficiency of the evidence to prove the commission of that offense.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment V:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

The Constitution of the United States, Amendment XIV, Section I:

". . . No state shall make or enforce any law which shall abridge

the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Richard Austin Greene, along with Joseph Manuel Sosa, was found guilty in a Florida state jury trial in 1965 of murder in the first degree. During that proceeding counsel for Petitioner made a motion for a directed verdict of acquittal and a motion for new trial. Both were denied. Petitioner received the death penalty.

On November 5, 1968, the Florida Supreme Court reversed the conviction. In a per curiam decision, the Florida Supreme Court concluded that:

> [A]fter a careful review of the voluminous evidence here we are of the opinion that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Sosa v. State, 215 So. 2d 736, 737 (Fla. 1968) (Appendix B).

On remand from the Florida Supreme Court's reversal, Petitioner obtained a transfer of venue for his retrial to the Circuit Court of Orange County, Florida. Petitioner's request for a writ of prohibition based on the contention that his retrial for first degree murder would constitute double jeopardy was denied by the state trial court and, upon appeal of the denial, the appellate court affirmed. Sosa v. Maxwell, 234 So. 2d 690 (2d DCA Fla. 1970). (Appendix C).

Upon retrial, Petitioner was again convicted of first degree murder, but with a recommendation for mercy. Petitioner was sentenced to life imprisonment which he has been serving continuously

to date.

Petitioner appealed to the Fourth District Court of Appeal of Florida on the ground that his retrial for the same offense after the Florida Supreme Court had found the evidence at his first trial insufficient to establish his guilt beyond a reasonable doubt placed him in double jeopardy. The Fourth District Court of Appeal affirmed his conviction. Sosa and Greene v. State, 302 So. 2d 202 (4th DCA Fla. 1974). (Appendix D). A petition for a writ of certiorari reiterating the double jeopardy claim was denied by the United States Supreme Court. Greene v. Florida, 421 U.S. 932 (1975).

Thereafter, Petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, urging that the Double Jeopardy Clause bars retrial once a conviction for the same offense is reversed because the trial court erred in not granting acquittal due to insufficient evidence. In its February, 1976, order, the District Court intimated that absent prior precedent in the Fifth Circuit it might have granted Petitioner's request. However, constrained by precedent of Fifth Circuit opinions, the District Court denied the writ.

Petitioner appealed the denial of habeas corpus relief to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. §2253. The denial of the writ was affirmed because in addition to his motion for acquittal Petitioner had moved for a new trial. Greene v. Massey, 546 F.2d 51 (5th Cir. 1977). (Appendix A). The Circuit Court further based its belief that retrial was proper in this case because the federal circuit courts have the power to reverse for retrial in such cases pursuant to 28 U.S.C. §2106 and the Florida Supreme Court has similar power of review.

REASONS FOR GRANTING THE WRIT

1. THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN ACCORD WITH OPINIONS OF THE SUPREME COURT.

Petitioner, Richard Austin Greene, in 1965, was convicted of first degree murder. On appeal, the Florida Supreme Court overturned that conviction on its finding that the State had presented insufficient evidence to establish defendant's guilt beyond a reasonable doubt. Sosa v. State, 215 So. 2d 736, 737 (Appendix B). However, in its per curiam opinion, the court remanded for a new trial for the same offense, and it is this eventuality that gives rise to the double jeopardy claim.

That Petitioner was entitled to an order of acquittal by the trial judge is stated in language that could not have plainer meaning:

> After a careful review of the voluminous evidence here we are of a view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Sosa v. State, 215 So. 2d 736, 737 (Fla. 1968) (Emphasis added).

When the Florida Supreme Court held the evidence to be insufficient to convict as a matter of law, it established that the trial court erred in failing to acquit. If the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would prevent a new trial for the same offense. There should be no difference when an appellate court, correcting the injustice by ruling as the trial judge should have ruled, orders a judgment of acquittal for lack of evidence. Sapir v. United States, 348 U.S. 373, 374 (1955) (per curiam) (Douglas, J., concurring).

Having decided that the evidence is insufficient to convict, an appellate court cannot remand for a new trial under the rationale that justice is thereby served without violating the plain justice that logic and the double jeopardy clause demand. Mere citation of a rule of procedure or statute will not justify retrial when the United States Constitution is thereby contravened. However, the court below reasoned that the decisions of the Supreme Court establish that the federal circuit courts have

the power under 28 U.S.C. §2106, to remand for a new trial after finding that the evidence was insufficient to convict. Greene v. Massey, 546 F.2d 51, 55 (5th Cir. 1977). (Appendix A-5). The Court further reasoned that under Florida Statute §924.32 the Florida Supreme Court had similar power to remand Petitioner's case for retrial. Id. at 56 (Appendix A-6).

The Court below clarifies that it relies, for its opinion, on a trilogy of Supreme Court decisions: Bryan v. United States, 338 U.S. 552 (1950); Sapir v. United States, 348 U.S. 373 (1955) and Forman v. United States, 361 U.S. 416 (1960). The distinction among these cases, the Circuit Court opined, turns upon whether the defendant made a motion for a new trial in the trial court. Id. at 55 (Appendix A-5).

A defendant who obtains from the trial judge the directed verdict of acquittal to which he is entitled because of insufficient evidence cannot be retried for the same offense. Green v. United States, 355 U.S. 184 (1957). It is incongruous and illogical that a defendant who obtains from an appellate court a reversal of his conviction due to insufficient evidence to convict can be retried. The reason for reversal is identical to the reason for the directed verdict: the prosecution failed to present sufficient evidence to prove the crime charged. What this amounts to is that when a trial court errs in not granting an acquittal the defendant can be subjected to retrial. How can the error of a trial judge vitiate the application of the double jeopardy clause thus penalyzing the defendant for the Court's error?

The Court below reasons that the result differs when a defendant moves for a new trial as opposed to when he merely appeals the trial court's failure to direct acquittal. Id. at 55. In the former instance he can be retried. In the latter, he cannot. This is an illogical distinction as well, since in both instances the trial judge erred in not acquitting. The logical remedy is acquittal not retrial. Admittedly, the law heretofore

enunciated by the Supreme Court has contributed to the uncertainty in applying the double jeopardy clause. See, e.g., United States v. Bass, 490 F.2d 846 (5th Cir. 1974).

The Supreme Court first encountered the question of the permissibility of remanding for a new trial after a reversal for insufficient evidence in Bryan v. United States, 338 U.S. 552 (1950). After extensive discussion of the statutory power of the Courts of Appeals the defendant's contention that a retrial would violate the double jeopardy clause was viewed thusly:

> He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal. . . [W]here the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. Francis v. Resweber, 329 U.S. 459, 462 (1947). See Trono v. United States, 199 U.S. 521, 533-534.

338 U.S. 552, 560.

The Court, however, did not seem to perceive the new issue of double jeopardy. The quote from Francis v. Resweber, 329 U.S. 459, 462 (1947) was dictum, and that case relied on United States v. Ball, 163 U.S. 662 (1895) which was concerned with a defective indictment not insufficient evidence. Not until Sapir v. United States, 348 U.S. 373 (1955) was the issue of reversal for insufficient evidence delineated from reversal for other error infecting a trial, and the Court has yet to face the issue presented by Appellant. The holding in Bryan v. United States, 338 U.S. 552 (1950), then, cannot be said to be controlling on the issues presented by Appellant, herein.

In Sapir v. United States, 348 U.S. 373 (1955), the Defendant had appealed from a conviction of conspiracy to defraud the United States. He had moved for a judgment of acquittal but the District Court denied the motion. On appeal, the Court of Appeals held that the motion should have been granted since the evidence was insufficient to convict, and it remanded with instructions to dismiss. 216 F.2d 722 (10th Cir. 1954). Upon the government's

motion for rehearing based on newly discovered evidence a new trial was granted. In a per curiam opinion the Supreme Court reinstated the first judgment. 348 U.S. 373. The Court did not directly face the double jeopardy issue saying merely that the first judgment directing acquittal was the correct one. Id.

Concurring in Sapir, Justice Douglas addressed the constitutional question. He argued that a new trial after an acquittal by an appellate court for insufficient evidence was no different from an acquittal by a trial court, and that a new trial was in either case proscribed by the double jeopardy clause of the Fifth Amendment. 348 U.S. at 374. He stated:

> If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen. If, as in the Kepner case, the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would prevent a new trial of the old offense. I see no difference when the appellate court orders a judgment of acquittal for lack of evidence.

Id. It is noteworthy that Sapir had not alleged other errors and had made no motion for a new trial. Had those factors been present, however, it was not certain that the case would have been decided differently. Justice Douglas indicated that when a new trial is asked for then new considerations come into play, and the whole record is opened up for such disposition as is just. Id., citing Bryan v. United States, 338 U.S. 552 (1950). And see Trono v. United States, 199 U.S. 521 (1905); Stroud v. United States, 251 U.S. 15, 18 (1919); Francis v. Resweber, 329 U.S. 459, 462 (1947). A reversal on grounds of error that infected the trial would also be different. Id. citing Palko v. Connecticut, 302 U.S. 319 (1937). An acquittal on the basis of lack of evidence, however, concludes the controversy. Id.

Except for Justice Douglas' assertion that an acquittal for lack of evidence concludes the controversy, none of his other pronouncements concerning the effect of reversal for error or the effect when there is a motion for a new trial were

material to the case. It was not ascertainable whether his rationale was wholly that of the majority.

In Forman v. United States, 361 U.S. 427 (1960), it is revealed that Justice Douglas' opinion in Sapir was a fair statement of the law. In that case, the Defendant had appealed his conviction seeking a new trial. The Court of Appeals first reversed his conviction and remanded for an acquittal due to an erroneous instruction by the trial court on the statute of limitations. The Defendant's request for a new trial, however, had not been on grounds of insufficient evidence. On rehearing, the Court of Appeals remanded for a new trial. The Supreme Court held that a new trial would not violate the double jeopardy clause.

Again, however, as in Sapir, the issue of double jeopardy presented in the case sub judice was absent. In fact, no issue of double jeopardy underlay the Court's holding in Forman. There was ample evidence to convict. Id. at 426.

In comparison, the Court reinforced the opinion of Justice Douglas, rendered in Sapir, that an acquittal by an appellate court was entitled to the same weight as an acquittal by a trial court, at least where there was no request for a new trial. Even so, the Court seem to express that if a new trial was requested, then the whole record is opened up for whatever relief is just, even if it is beyond the relief sought. Id. at 425.

Again, Petitioner emphasizes that, in Sapir, no request for a new trial was made nor error alleged except that of failure to acquit. In Forman, the evidence was sufficient and the case turned instead on trial error. Therefore, the Supreme Court has not faced the issue of whether retrial upon a decision that the evidence is insufficient when the Defendant has requested a new trial because of errors at trial violates the double jeopardy clause. It's pronouncements on that point have been rendered as dicta.

The key determinant of whether the double jeopardy clause is implicated is whether a defendant will be subjected to multiple

trials for the same offense. United States v. Wilson, 420 U.S. 332 (1975). Green v. United States, 355 U.S. 184 (1957). In the case at bar, Petitioner has been subjected to multiple trials and this is inconsistent with the requirements of Wilson. See, also, United States v. Jenkins, 420 U.S. 358 (1975).

In fact, the opinion of the Court below leads to a situation in which repeated retrial for the same offense can go on endlessly as long as the defendant moves for a new trial on error other than failure to acquit. And even if there is no other error than that the evidence is insufficient, the state may retry such a defendant. This is clearly inconsistent with double jeopardy principles.

The justification for retrial is lacking when reversal is for lack of evidence. The appellate court in such cases is specifically holding that the prosecution has failed to meet the burden of proof and that a defendant was entitled to acquittal at trial. It is clear that situations which afford the prosecution a second chance to strengthen its case but, yet, deny the defendant the finality of his entitlement to an acquittal are violative of the double jeopardy clause. See, United States v. Dinitz, ____U.S. ____, 96 S.Ct. 1075 (1976); United States v. Wilson, 20 U.S. 355, 353 (1975).

Therefore, Petitioner urges, that the Court of Appeals erred in finding that Petitioner's request for a new trial permitted his retrial since any reading of Bryan, Sapir, and Forman suggests that the logical consequence of this application is that an appellate finding that there was insufficient evidence to convict should be no different from a directed verdict of acquittal at trial: in either case the double jeopardy clause bars retrial of a defendant for the same offense.

2. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEALS AND HAS LED TO CONFLICTING APPLICATION OF FEDERAL DOUBLE JEOPARDY PRINCIPLES IN THE STATE COURTS.

The United States Courts of Appeals unanimously agree that the federal appellate courts have discretion to either grant a new trial or direct an acquittal when a trial court errs in not directing acquittal. However, the Circuit Courts have conflicting approaches as to when retrial is within their discretion. (It has been discussed above that retrial in such cases is never justified under the decisions of the Supreme Court.)

The Fifth Circuit and the Eighth Circuit agree that retrial is proper whenever a defendant has moved for retrial. E.g., United States v. Koonce, 485 F.2d 374 (8th Cir. 1973); United States v. Musquiz, 445 F.2d 963 (5th Cir. 1971). The Fourth and Ninth Circuits have suggested, without deciding, that such a motion may be a prerequisite to retrial. See, United States v. Snider, 502 F.2d 645, 656n.24 (4th Cir. 1974); Buatte v. United States, 331 F.2d 848 (9th Cir. 1964).

The District of Columbia Circuit has questioned the validity of the Eighth Circuit's approach in Koonce, indicating that whether the defendant has moved for a new trial should not be a factor in the court's decision to retry. United States v. Wiley, 517 F.2d 1212, 1217 (D.C. Cir. 1975). In that case the Circuit Court ordered acquittal despite the fact that defendant had moved for a new trial. The Court's decision, however, was based upon its power under 28 U.S.C. §2106 rather than on double jeopardy principles.

Several Circuits have held that the decision to order trial is determined by the ability of the government to supplement its inadequate case if allowed to retry the defendant. E.g., United States v. Koonce, 485 F.2d 374 (8th Cir. 1973). (Mere possibility of obtaining sufficient evidence justifies retrial.); Beltran v. United States, 302 F.2d 48 (1st Cir. 1962); United States v. Snider, 502 F.2d 645 (4th Cir. 1974) (Indictment dismissed because insufficiency could not be cured on retrial).

Some cases have held that it would be "unjust" to give the prosecution a second chance to succeed after failing to make

a sufficient case at the first trial. E.g., United States v. Dotson, 440 F.2d 1225 (10th Cir. 1971). The Second Circuit, however, appears to have taken a unique approach: acquittal is appropriate if the prosecution has presented absolutely no competent evidence to establish a prima facie case, but if some evidence has been presented retrial is proper regardless of the prosecution's ability to supplement its case. E.g., United States v. Steinberg, 525 F.2d 1126, 1134-1135 (2d Cir. 1975).

A growing number of state courts have held that retrial after an appellate finding of insufficient evidence is barred by the Fifth Amendment double jeopardy clause. E.g., State v. Torres, 510 P.2d 737, 739 (Ariz. 1973); Hervey v. People, 495 P.2d 204, 208 (Colo. 1972); People v. Brown, 241 N.E. 2d 653, 659-664 (1st Dist. App. Ill. 1968); Commonwealth v. Dale, 335 A.2d 314 (Pa. Super. 1974) These decisions bring to their logical application the opinions in Forman v. United States, 361 U.S. 416 (1960) and Sapir v. United States, 348 U.S. 373 (1955).

Therefore, the decision of the Court of Appeals below is in conflict with the decisions in the several federal circuits and a growing number of states. It is a matter of great public interest that the conflict be resolved so that criminal defendants in like circumstances, whether in the federal or the state courts, can rely on the uniform application of Fifth Amendment double jeopardy principles to their situations.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

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APPENDIX A is a photocopy of the Opinion at 546 F 2nd 51 and has not been microfilmed.

APPENDIX B is a photocopy of the Opinion at 215 SO. 2nd 736 and has not been microfilmed.

APPENDIX C is a photocopy of the Opinion at 244 SO. 2nd 690 and has not been microfilmed.

APPENDIX D is a photocopy of the Opinion at 302 SO. 2nd 202 and has not been microfilmed.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RICHARD AUSTIN GREENE,

Petitioner,

vs

No. 75-140-ORL-CIV-Y

RAYMOND D. MASSEY,
Superintendent, Union
Correctional Institution,

Respondent.

FILED
ORLANDO, FLA.
FEB 24 1976
WESLEY R. THIES
CLERK

ORDER

This cause came before the Court on a petition for writ of habeas corpus pursuant to 28 U.S.C.§2254. Petitioner was initially convicted of first degree murder on November 25, 1965, along with co-defendant Jose Manuel Sosa. The death sentence was imposed upon both defendants. On November 5, 1968, the Florida Supreme Court reversed that conviction in a per curiam decision which recited:

> "After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial. Sosa v. State 215 So. 2d 736, 737."

Petitioner moved successfully to transfer the retrial to the Circuit Court of Orange County, Florida. He then sought a writ of prohibition in the Second District Court

of Appeal on the ground that a retrial for first degree murder would constitute double jeopardy. The Second District Court of Appeal affirmed the trial court and refused to issue the writ. Sosa v. Maxwell, 234 So. 2d 690 (2d DCA Fla. 1970).

Upon retrial, defendant was again convicted of first degree murder, but this time with a recommendation for mercy and a life sentence. An appeal to the Fourth District Court of Appeal in which petitioner again raised the ground of double jeopardy, was taken and the appellate court affirmed on the strength of the previous opinion of the Second District Court of Appeal in refusing to issue a writ of prohibition. Greene vs. State, 302 So. 2d 202 (4th DCA, Fla. 1974). A petition for certiorari to the United States Supreme Court reiterating the double jeopardy claim was subsequently denied by that Court.

This Court has previously found that petitioner has exhausted his state remedies (Order of December 30, 1975).

The contention of petitioner has never specifically been ruled upon by the United States Supreme Court. See Bryan v. U.S., 338 U.S. 552 (1950); Sapir v. U.S., 348 U.S. 373 (1955) (concurring opinion of Douglas, J.); Forman v. U.S., 361 U.S. 427 (1960). If this were a question of first impression in the Fifth Circuit, this Court might be inclined to grant the petition. Regardless of whether an appellate court or a trial jury makes the determination that the evidence is

insufficient to sustain a finding of guilt as to a particular charge, and regardless of whether a petitioner moves for a new trial on other grounds in addition to asserting the ground of insufficiency of evidence, it would seem that the double jeopardy clause would preclude giving the prosecution a second chance. See Green vs. U. S., 355 U.S. 184 (1957). However, as petitioner has conceded, this is not the law in the Fifth Circuit. See, U.S. vs. Bass, 490 F.2d 846 (5th Cir. 1974). Furthermore, the situation of petitioner is not as compelling as that in which the "hung" jury fails to convict but does not render a verdict of acquittal. In the "hung" jury situation, a line of cases stemming from the 1824 decision in United States vs. Perez, 22 U. S. (9 Wheat.) 579, has held retrial proper. Here petitioner has in fact been found guilty by a jury.

Since this Court is bound by the present law of the Fifth Circuit and the United States Supreme Court, the petition for writ of habeas corpus must be denied. Accordingly, it is

ORDERED that the petition for writ of habeas corpus be and is hereby dismissed with prejudice.

DONE AND ORDERED in Chambers at Orlando, Florida this 24th day of February, 1976.

George C. Young
Chief Judge